Maiko Woods Maritime & Properties Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-457 OF 1996
KAMALANATHAN RATNAM J
13 AUGUST 1998

Civil Procedure *— Locus standi — Representation of company which had been ordered to be wound up — Application by law firm to represent company — No authority from liquidator — Whether law firm had locus standi to make application*

Companies and Corporations *— Winding up — Suit by company — Application by law firm to represent company in pending suit — No authority from liquidator — Whether law firm had locus standi to make application — Whether application should be made to court which had made winding-up order — Companies Act 1965 s 236(1)(f) — Companies (Winding-Up) Rules 1972 r 163*

After the plaintiffs had filed a suit for the rescission of a loan agreement entered into between the plaintiffs and the defendant ('the suit'), the defendant commenced winding-up proceedings against the first plaintiff in the commercial court and a winding-up order was made against the first plaintiff. Bosco Philip Anthony & Associates made this application, inter alia, that they be appointed to represent the first plaintiff in the suit. The defendant raised two preliminary objections, namely that the applicant had no locus standi and that the application ought to be made properly in the commercial court that granted the winding-up order.

Held, dismissing the application:

(1) There was no evidence before the court that the liquidator had sought the court's authority to appoint the legal firm of Bosco Philip Anthony & Associates to assist him pursuant to s 236(1)(f) of the Companies Act 1965 ('the Act'). In the absence of any evidence before the court that the Official Receiver had in fact consented to the appointment of the said legal firm, the defendant's submission that the applicant lacked locus standi must be upheld (see p 398B–E).

(2) Every application that flows directly or arises impliedly as a result of the making of a winding-up order under the Act is a proceeding in a winding-up matter. Thus this application which was an application made pursuant to s 236(1)(f) of the Act is a proceeding in a winding-up matter and ought to be filed in the Commercial Division of the High Court in which the winding-up order was made (see p 398G).

[Bahasa Malaysia summary

Selepas plaintif-plaintif memfailkan suatu guaman untuk pembatalan perjanjian pinjaman yang diikat di antara plaintif-plaintif dan defendan

('guaman tersebut'), defendan telah memulakan prosiding penggulungan terhadap plaintif pertama di mahkamah perdagangan dan suatu perintah penggulungan telah dibuat terhadap plaintif pertama. Bosco Philip Anthony & Associates telah membuat permohonan ini, antara lain, bahawa mereka dilantik untuk mewakili plaintif pertama dalam guaman tersebut. Defendan membangkitkan dua bantahan permulaan, iaitu bahawa pemohon tidak mempunyai apa-apa locus standi dan bahawa permohonan haruslah dibuat dengan wajarnya di mahkamah perdagangan yang memberikan perintah penggulungan.

Diputuskan, menolak permohonan:

(1) Tiada sebarang keterangan di hadapan mahkamah bahawa penyelesai telah meminta kebenaran mahkamah untuk melantik firma undang-undang Bosco Philip Anthony & Associates untuk membantunya menurut s 236(1)(f) Akta Syarikat 1965 ('Akta tersebut'). Dalam ketiadaan sebarang keterangan di hadapan mahkamah bahawa Pegawai Penerima pada hakikatnya telah menyetujui perlantikan firma undang-undang tersebut, hujah defendan bahawa pemohon kekurangan locus standi mestilah dibenarkan (lihat ms 398B–E).

(2) Setiap permohonan yang berbangkit secara terus atau timbul secara tersirat akibat pembuatan satu perintah penggulungan di bawah Akta tersebut merupakan prosiding dalam perkara penggulungan. Justeru itu permohonan ini yang merupakan permohonan yang dibuat menurut s 236(1)(f) Akta tersebut adalah prosiding dalam perkara penggulungan dan haruslah difailkan di Bahagian Perdagangan Mahkamah Tinggi di mana perintah penggulungan dibuat (lihat ms 398G).]

Notes

For cases on locus standi, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3083–3118.

For cases on winding-up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Legislation referred to

Companies Act 1965 s 236(1)(f), (2)(a), (3)
Companies (Winding-Up) Rules 1972 r 163
Rules of the High Court O 15 r 6(2)(b)

Bosco Philip Anthony (*Rajaswari Ramiah* with him) *(Bosco Philip Anthony & Associates)* for the third to fifth plaintiffs.
Teo Cheng Wee (Khaw & Hussein) for the defendant.
Zaharah Naim for the Official Receiver.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

Arising out of a loan agreement between the plaintiffs and the defendant, the defendant foreclosed the plaintiffs' land. This suit filed by the plaintiffs on 30 August 1996 is, inter alia, for rescission of the said loan agreement with other prayers.

In the meantime, the defendant commenced winding-up proceedings against the first plaintiff in the commercial court by way of Kuala Lumpur High Court Companies (Winding-Up) No D4–28–354–96 and a winding-up order was made on 26 August 1997 against the first plaintiff.

The present application (encl 45)

The legal firm of Bosco Philip Anthony & Associates made an application by way of summons-in-chambers for various prayers, namely:

(1) that the said firm be appointed to represent the first plaintiff in Civil Suit S2–22–457–96;

(2) that all costs incurred arising out of the said representation be borne by one Showey Ling (I/C 7436331) who undertook not to make any claim for damages or costs against the Official Receiver Malaysia, or the provisional liquidator or from the estate of the first plaintiff;

(3) that the said legal firm of Bosco Philip Anthony & Associates make no claim against the Official Receiver Malaysia or the provisional liquidator or from the estate of the first plaintiff arising out of this action;

(4) any other order the court felt was fair and necessary; and

(5) that costs of this application be costs in the cause.

Preliminary objection

At the outset the defendant raised two preliminary objections:

(1) that the applicant has no locus standi to make this application; and

(2) that this application ought to be made properly in the commercial court that granted the winding-up order.

Court's findings

Locus standi

It is trite that upon an order for winding-up being made the retainer of counsel is also terminated. However the liquidator may, pursuant to s 236(2)(a) of the Companies Act 1965 ('the Act') bring or defend any

action or other legal proceedings in the name and on behalf of the company. The liquidator may also, pursuant to s 236(1)(f) with the authority either of the court or of the committee of inspection, appoint an advocate to assist him in his duties.

There is no evidence before me that the liquidator has sought this court's authority to appoint the legal firm of Bosco Philip Anthony & Associates to assist him pursuant to s 236(1)(f). There is not even an affidavit filed by the liquidator. No doubt counsel for the applicant must have realized this because in a futile attempt to disclose its appointment counsel annexed to his written submission a photostat copy of a letter purportedly signed by one Ishak bin Bakri, peguam persekutuan, Jabatan Pemegang Harta, Malaysia, and dated 15 June 1998. Counsel ought to know that this is not the way to exhibit a document. Needless to say I have ignored it. A simple step of having the liquidator affirm an affidavit would have sufficed.

It is trite that upon being wound up the property in the suit vests with the liquidator. If the contributories of the first plaintiff are of the view that the suit in question ought to be continued with, they are entitled to take steps to get leave to proceed with the claim (see s 236(3) of the Act). They may even use the name of the liquidator upon giving sufficient indemnity. In the absence of any evidence before me that the Official Receiver had in fact consented to the appointment of the said legal firm I must find for the defendant and uphold the submission that the applicant lacks locus standi.

Is the application properly made in this court?

It is obvious that this application is made pursuant to s 236(1)(f) of the Act. It is therefore only logical that this application which is obviously a proceeding in a winding-up matter, should be filed under the petition in which the winding-up order was made, namely under Kuala Lumpur High Court Companies (Winding-Up) No D4–28–354–96. It is my judgment that every application that flows directly or arises impliedly as a result of the making of a winding-up order under the Act is a proceeding in a winding-up matter. In the circumstances I hold that an application made pursuant to s 236(1)(f) of the Act is a proceeding in a winding-up matter and ought to be filed in the Commercial Division of the High Court in which the winding-up order was made.

I draw strength in arriving at this conclusion when I refer to r 163 of the Companies (Winding-Up) Rules 1972 which empowers the judge of the commercial court who granted the order for winding-up 'to order the transfer to him of any action cause or matter pending brought or continued by or against the company'. For all I know he might even order the transfer of this case to his court. On this ground too I ought not to interfere with his right to hear this application.

I shall not make any decision as to whether the applicant ought to have first made an application under O 15 r 6(2)(b) of the Rules of the High Court 1980. That ought to be considered by the learned judge who will hear this application.

A The preliminary objections are therefore upheld. The application is dismissed with costs.

Application dismissed with costs.

Reported by Mohd Rizal Abidin

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